NOTES

FEDERAL REGULATION OF INTRASTATE RAILROAD RATES.—Two great principles were set forth in *Gibbons* v. *Ogden*[1],—actual regulation of interstate commerce[2] by Congress excludes regulation thereof by the States; and the regulation of internal commerce rests exclusively with the states.[3] Since Congress had acted, the question of the power of the state to legislate affecting interstate commerce in the absence of Congressional legislation was not involved. This proved a vexed problem and various theories were enunciated by the Supreme Court.[4] In *Cooley* v. *Board of Wardens,*[5] the rule which became the basis for subsequent adjudications was enunciated, namely, that whenever the subjects of interstate commerce admit of only[6] one uniform system or plan of regulation, the power of Congress is exclusive, while in peculiarly local matters, the states may act within their respective jurisdictions until Congress sees fit to act.[7] The Granger cases[8] constitute the next stage in the judicial construction of the commerce clause.[9] The effect of these cases was that until Congress acts, the states may themselves regulate matters essentially national in their nature, that is, interstate railroad rates. This doctrine was repudiated in *Wabash, St. L. & P. Ry.* v. *Illinois,*[10] and the exclusive character of the power of Congress over interstate commerce was clearly recognized.[11] The court said that inaction on the part of Congress was equivalent to its determination that interstate commerce must

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[1] (1824) 9 Wheat. 1.

[2] For a true definition of interstate commerce and a discussion of the problem as to when an interstate shipment ceases to be interstate and becomes intrastate, see *Gulf etc. Ry.* v. *Texas* (1907) 204 U. S. 403, 27 Sup. Ct. 360; *General Oil Co.* v. *Crain* (1908) 209 U. S. 211, 28 Sup. Ct. 475.

[3] "The genius and character of the whole government seems to be that its action is to be applied to all the external concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself." Chief Justice Marshall, *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, 194.

[4] *Willson* v. *Black Bird Creek Marsh Co.* (1829) 2 Pet. 245; *New York* v. *Miln* (1837) 11 Pet. 102; *License Cases* (1847) 5 How. 504; *Passenger Cases* (1849) 7 How. 283.

[5] (1851) 12 How. 299.

[6] In later opinions, the word *"only"* was omitted in the statement of the rule so as to read "admit of *one* uniform system or plan of regulation". See *State Freight Tax Cases* (1872) 15 Wall. 232, 279; *Welton* v. *Missouri* (1875) 91 U. S. 275, 280; *Ex parte McNeil* (1871) 13 Wall. 236, 240; *Mobile* v. *Kimball* (1880) 102 U. S. 691, 697.

[7] This state power is frequently called "concurrent", but the use of such a word conveys the idea of simultaneous operation of state and federal power, whereas the former operates only when the latter is not exercised. "Dominant" and "servient" are better descriptive terms.

[8] *C. B. & Q. R. R.* v. *Iowa* (1876) 94 U. S. 155; *Peik v. Chicago & N. W. Ry.* (1876) 94 U. S. 164; *Winona & St. P. R. R.* v. *Blake* (1876) 94 U. S. 180.

[9] "The Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U. S. Const., Art. I, § 8(3).

[10] (1886) 118 U. S. 557, 7 Sup. Ct. 4; *cf. Hanley* v. *Kansas City, etc. Ry.* (1903) 187 U. S. 617, 23 Sup. Ct. 214. The principle set forth in the *Wabash* case was followed in succeeding cases. *Dow* v. *Beidelman* (1888) 125 U. S. 680, 8 Sup. Ct. 1028; *Reagan* v. *Farmers' Loan & Trust Co.* (1894) 154 U. S. 362, 14 Sup. Ct. 1043; *Reagan* v. *Mercantile Trust Co.* (1894) 154 U. S. 413, 14 Sup. Ct. 1060.

[11] The statute of Illinois before the court stated that if any railroad company

be free, and any state regulation[12] concerning it is inoperative and void.[13] In the *Eubank*[14] case, which followed, the court disallowed the right of a state to require intrastate rates to be adjusted with reference to interstate rates. Making the *Wabash* case the basis of its decision, the Supreme Court held that the state regulation was invalid, although the rate sought to be regulated in the *Eubank* case was intrastate, while in the former case it was interstate.[15]

The next landmark in the development of the commerce clause by judicial interpretation is *Smyth* v. *Ames.*[16] Here the court indicated that a state may not require that a purely internal rate be not higher than an interstate rate for the same distance, since this puts an effective pressure upon interstate rates. When a state regulates its internal rates, it must do so with reference only to the earnings and expenses of internal traffic. Interstate receipts and expenses must be disregarded.[17] Even though a state could not regulate interstate rates in whole or in part, the courts, consistent with prior decisions, declined in the absence of Congressional legislation to hold void legislation of purely intrastate rates on the ground that such regulation indirectly interfered with interstate commerce.[18] This case also upheld the theory of the separability of the state and national functions of rate-making. On the question of the separability of intrastate business from interstate business, adjudications of the Supreme Court are plentiful.[19] It has been argued that since rates are but the symbols of business, interstate rates must be separable from intrastate rates.[20] The doctrine of separability was

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should, within the state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance in the same direction for an interstate transaction, the company would be liable to a penalty for unjust discrimination.

[12] The courts, in distinguishing between state "regulation" of interstate commerce, and state legislation under the taxing and police power which merely "affects" interstate commerce, have indulged in many subtle distinctions. See Judson, *Interstate Commerce* (3rd ed. 1916) §§ 28 *et seq.;* Freund, *Police Power* (1904) §§ 70 *et seq.*

[13] In overruling the effect of the Granger Cases, the court said that although a state could not regulate an interstate rate under any conditions, its authority to regulate its internal railroad rates was not questioned. *Wabash, St. L. & P. Ry.* v. *Illinois, supra,* footnote 11, p. 564.

[14] *Louisville & N. R. R.* v. *Eubank* (1902) 184 U. S. 27, 22 Sup. Ct. 277.

[15] The pendulum again swung back slightly in the case of *Missouri Pac. Ry.* v. *Kansas* (1910) 216 U. S. 262, 30 Sup. Ct. 330, which virtually overruled the effect of the *Eubank* case.

[16] (1897) 169 U. S. 466, 18 Sup. Ct. 418.

[17] *Smyth* v. *Ames, supra,* footnote 16, is also important because it sets forth the true doctrine of due process of law, as required by the Constitution in relation to railroad rates: " . . . It is only rates for the transportation of persons and property within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public in respect of domestic business. The argument that a railroad line is an entirety, that its income goes into and its expenses are provided for, out of a common fund, and that its capitalization is on its entire line, within and without the state, can have no application where the state is without authority over rates on the entire line, and can only deal with local rates and makes such regulations as are necessary to give just compensation over local business." *Ibid.,* 541, 542.

[18] *Atlantic Coast Line* v. *Wharton* (1907) 207 U. S. 328, 28 Sup. Ct. 121.

[19] *U. S. Express Co.* v. *Minnesota* (1912) 223 U. S. 325, 32 Sup. Ct. 211; *Atchison, etc. Ry.* v. *O'Connor* (1912) 223 U. S. 280, 32 Sup. Ct. 216; *Oklahoma* v. *Wells Fargo Co.* (1912) 223 U. S. 288, 32 Sup. Ct. 218; *Bacon* v. *Illinois* (1913) 227 U. S. 504, 33 Sup. Ct. 299; *Susquehana Coal Co.* v. *South Amboy* (1913) 228 U. S. 665, 33 Sup. Ct. 712; *Baltic Mining Co.* v. *Massachusetts* (1913) 231 U. S. 681, 34 Sup. Ct. 15.

[20] *Dow* v. *Beidelman, supra,* footnote 11; *Georgia Banking Co.* v. *Smith* (1898) 128 U. S. 174, 9 Sup. Ct. 47; *Chicago etc. Ry.* v. *Wellman* (1892) 143 U. S. 339,

further elucidated in cases involving state taxation of foreign corporations.[21]

In the *Safety Appliance Cases,*[22] the Supreme Court held that Congress can require the use of safety appliances on all equipment used on any railroad engaged in interstate commerce, even though the equipment may be used for intrastate traffic.[23] Later, it was decided that the protection of the Safety Appliance Act extended to all employees of interstate carriers, even though at the time of the injury they might be engaged in purely intrastate commerce.[24] To this extent the doctrine of separability was discarded.[25]

The *Minnesota Rate Cases*[26] came next. The great central conclusion of these cases is that the regulation of intrastate rates by the state does not, in itself, necessarily place a direct burden on interstate commerce. A regulation of internal rates by a state is not invalidated, in the absence of action by Congress, merely because the competitive effect of such rates virtually compels carriers to make a corresponding alteration of their interstate rate. Although it has been asserted that under the *dicta* of these cases Congress has complete jurisdiction over intrastate rates,[27] they suggest that interstate rates are subject to federal control where freedom of interstate commerce and its proper regulation can not otherwise be secured.[28] This is nothing more than an exercise by Congress of the power[29] given it by the necessary-and-proper clause[30] of the Constitution.[31]

The Supreme Court's growing recognition of the interrelation of interstate and

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12 Sup. Ct. 400; *Minneapolis & St. P. R. R.* v. *Minnesota* (1902) 186 U. S. 257, 22 Sup. Ct. 900.

[21] See *Pullman Co.* v. *Adams* (1903) 189 U. S. 420, 421, 23 Sup. Ct. 494; *Allen* v. *Pullman Co.* (1903) 191 U. S. 171, 181, 24 Sup. Ct. 39. In these cases, the court indicated that even though the taxation of the intrastate receipts was ultimately taken from the interstate receipts, such taxation was nevertheless valid. See also *Flint* v. *Stone Tracy Co.* (1910) 220 U. S. 107, 165, 31 Sup. Ct. 343. But see *Western Union Tel. Co.* v. *Kansas* (1910) 216 U. S. 1, 30 Sup. Ct. 190; *Pullman Co.* v. *Kansas* (1910) 216 U. S. 56, 30 Sup. Ct. 232.

[22] *Southern Ry.* v. *United States* (1911) 222 U. S. 20, 32 Sup. Ct. 2. The same principle was set forth in *Baltimore & O. R. R.* v. *Interstate C. C.* (1911) 221 U. S. 612, 31 Sup. Ct. 621.

[23] The following cases involve similar questions: *United States* v. *Colorado & N. W. R. R.* (C .C. A. 1907) 157 Fed. 321; *Louisville & N. R. R.* v. *United States* (C. C. A. 1911) 186 Fed. 280; *Erie R. R.* v. *Russell* (C. C. A. 1910) 183 Fed. 722; *United States* v. *St. Louis & S. W. Ry. of Texas* (C. C. A. 1910) 184 Fed. 28.

[24] *Texas & Pac. Ry.* v. *Rigsby* (1916) 241 U. S. 33, 36 Sup. Ct. 482.

[25] It has been urged that even though the doctrine of separability has been abandoned in regard to physical equipment of railroads, it by no means follows that this doctrine does not hold in regard to regulatory power over rates. See Coleman, *The Vanishing Rate-Making Power of the States* (1914) 14 COLUMBIA LAW REV. 122, 136 ff.

[26] *The Minnesota Rate Cases* (1913) 230 U. S. 352, 33 Sup. Ct. 729.

[27] See Coleman, *Evolution of Federal Regulation of Intrastate Rates* (1915) 28 Harvard Law Rev. 34.

[28] The doctrine of the *Minnesota Rate Cases* was followed in these cases: *Knott* v. *St. Louis, etc. R. R.* (1913) 230 U. S. 512, 33 Sup. Ct. 983; *Oregon, etc. Co.* v. *Campbell* (1913) 230 U. S. 525, 33 Sup. Ct. 1026; *Chesapeake & O. Ry.* v. *Conley* (1913) 230 U. S. 513, 33 Sup. Ct. 985; *Allen* v. *St. Louis, I. M. & So. Ry.* (1913) 230 U. S. 553, 33 Sup. Ct. 1030.

[29] Frequently, this is erroneously called an application of the doctrine of *implied* powers. The power is *expressly* granted in the necessary-and-proper clause, but is *unenumerated.*

[30] "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof." U. S. Const. Art. I, § 8(18).

[31] Similar problems arose in the car distribution cases: *Interstate C. C.* v. *Illinois R. R.* (1910) 215 U. S. 452, 30 Sup. Ct. 155; *Baltimore & O. R. R.* v. *United States ex rel. Pitcairn Coal Co.* (1910) 215 U. S. 481, 30 Sup. Ct. 164; *Morrisdale Coal Co.* v. *Pennsylvania R. R.* (1913) 230 U. S. 304, 33 Sup. Ct. 938.

intrastate rates is illustrated by the *Shreveport Rate Case.*[32] Here, the Interstate Commerce Commission had found that discrimination[33] existed between the rates from Shreveport to Texas points, and those that were enforced in Texas cities to such Texas points. The carriers were ordered to remove the discrimination, which could only be done by increasing the intrastate rates.[34] The rule of the *Shreveport Rate Case* was followed in subsequent decisions.[35]

During the period of federal control of railroads,[36] the President was given the right to initiate rates for general application regardless of whether the commerce concerned was intrastate or interstate. This was upheld as a valid exercise of the war power[37] of the United States.[38] Upon termination of federal control, whether the courts would have adopted the theory of a continuing status until changed by affirmative act and thus held the war time rates valid until changed by appropriate state or national authority is of no great consequence,[39] for additional legislation specifically provided for such continuance.[40] The Transportation Act of 1920 also provided for an extension of the prohibition[41] to discrimination against interstate commerce as such.[42] Congress then provided[43] that the Interstate Commerce Commission can put into effect a schedule of rates so as to produce a fair return upon the value of its total property devoted to transportation use.[44]

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[32] *Houston, etc. Ry.* v. *United States* (1914) 234 U. S. 342, 34 Sup. Ct. 883.

[33] See Act to Regulate Interstate Commerce (1887) § 13.

[34] "Whenever the interstate and intrastate transactions are so related that the government of one involves the control of the other, it is Congress, not the state, that is entitled to prescribe the final and dominant rule, for otherwise, Congress would be denied the exercise of its constitutional authority, and the state, and not the nation, would be supreme in the national field." *Houston etc. Ry.* v. *U. S. supra,* footnote 32, p. 351.

[35] *American Exp. Co.* v. *South Dakota* (1917) 244 U. S. 617, 37 Sup. Ct. 656; *Illinois Central R. R.* v. *Public Util. Comm. of Ill.* (1918) 245 U. S. 493, 38 Sup. Ct. 170.

[36] Federal Control Act (1917) § 10.

[37] U. S. Const., Art. I, § 8 (11, 12, 13, 14).

[38] *Northern Pac. Ry.* v. *North Dakota* (1919) 250 U. S. 135, 39 Sup. Ct. 502; *cf. Dakota Central Tel. Co.* v. *South Dakota* (1919) 250 U. S. 163, 39 Sup. Ct. 507.

[39] See *Union Pac. R. R.* v. *United States* (1913) 48 Ct. Cl. 99, 109; *Pennsylvania R. R.* v. *International Coal Mining Co.* (1913) 230 U. S. 184, 197, 33 Sup. Ct. 893; Burgess, *New Limitations on Railroad Rates* (1920) 20 COLUMBIA LAW REV. 660, 667 ff.

[40] Transportation Act of 1920, § 208. Such legislation is unquestionably valid as an exercise of the war power since the validity of war-time proceedings is not to be vitiated upon the ending of the war. If the limitations are reasonably appropriate to permit a successful return to the peace status, they are constitutional. *Miller* v. *United States* (1870) 11 Wall. 268; *Hijo* v. *United States* (1904) 194 U. S. 315, 24 Sup. Ct. 727.

[41] Transportation Act of 1920, § 416, amending § 13 of the Act to Regulate Interstate Commerce (1887).

[42] § 13 of the Act to Regulate Interstate Commerce (1887) prohibited discrimination between localities, persons, and descriptions of traffic. Whether the term "descriptions of traffic" includes the body of interstate rates on the one hand and the body of intrastate rates on the other is now an academic question, for the amended section specifically prohibits discrimination against interstate commerce. It seems that this amended section simply enacted into statutory law the judicial construction of § 13 of the Act to Regulate Interstate Commerce. See *supra,* footnotes 32, 35. This section also authorizes the Interstate Commerce Commission to to fix *specific* rates, whereas heretofore, it could fix only reasonable maximum rates for interstate business and then order the removal of the discrimination. See *Illinois Central R. R.* v. *Public Util. Comm. of Ill., supra,* footnote 35, at p. 506.

[43] Transportation Act of 1920, § 422.

[44] For discussion of the problem as to whether in making such an order, the Commission is acting in a quasi-judicial capacity or purely as a branch of the

Can the Interstate Commerce Commission establish a scale of intrastate rates sufficiently high to enable the railroads to earn a fair return upon combined interstate and intrastate business? In the case of *Public Service Commission of New York* v. *New York Central R. R.*,[45] the defendant had been charging three cents a mile on its road between Albany and Buffalo by order of the national government which was operating the roads as an exercise of the war power. On the termination of federal control, the state commission directed a reduction of fares to two cents a mile, as limited by the company's charter. By oral stipulation, an order of the Interstate Commerce Commission was introduced before the New York Court of Appeals. This order, which was not before the state commission or the lower courts, authorized the defendant to exact fares for intrastate traffic equal to interstate charges. Since this order was not presented upon the record, the court did not pass upon the validity of the act of the Interstate Commerce Commission.[46]

In *People* v. *Long Island R. R. and Staten Island Rapid Transit Co.*,[47] the problem was squarely before the court. Both defendant carriers are predominantly intrastate carriers and their interstate business is very small compared to their total business. The Interstate Commerce Commission made an order, effective on all railroads, providing for an increase of passenger rates. The state commission refused to raise intrastate rates to the same extent as interstate rates, and the defendants, together with other New York railroads, appealed to the federal commission for relief. The latter ordered an increase of the intrastate rates to the level of the interstate charges. The validity of the order was called into question in this case. The court held: (1) Congress has no power to fix intrastate rates on lines of intrastate carriers; (2) even though Congress has such power, it has not conferred such power on the Interstate Commerce Commission either by the Interstate Commerce Act or by the Transportation Act of 1920; (3) Congress can regulate intrastate commerce only to prevent discrimination and not for the purpose of insuring the railroads a fair return on their combined business.

It is submitted that all these conclusions are unsound. Whether the defendants are located entirely in New York State or not is of no consequence if they engage in interstate commerce[48] by issuing through tickets to points outside the state. The court argues that the federal commission can not regulate intrastate rates since this is specifically excluded from the operation of the statute,[49] yet it

legislature, see *People ex rel. C. P. & N. E. R. R.* v. *Willcox* (1909) 194 N. Y. 383, 87 N. E. 517; *Prentis* v. *Atlantic Coast Line Co.* (1908) 211 U. S. 210, 29 Sup. Ct. 67; *Louisville & N. R. R.* v. *Garrett* (1913) 231 U. S. 298, 34 Sup. Ct. 48; *Wadley Southern Ry.* v. *Georgia* (1915) 235 U. S. 651, 35 Sup. Ct. 214.

[45] (N. Y. Ct. of App. 1921) 64 N. Y. L. J. 1163.

[46] The court said, "The Interstate Commerce Commission has found that as regards rates in New York, undue discrimination against interstate commerce does exist. From their opinion, it may be argued that this finding is based in part at least upon the theory that it may establish a scale of intrastate rates sufficiently high to enable the carrier to earn a fair return upon combined interstate and intrastate business. The authority of the Commission as now exercised has been widely questioned. . . . " *Ibid.* 1163.

[47] (Sup. Ct. 1920) 113 Misc. 700, 185 N. Y. Supp. 594.

[48] *The Daniel Ball* (1870) 10 Wall. 557; *Norfolk & W. R. R.* v. *Pennsylvania* (1890) 136 U. S. 114, 10 Sup. Ct. 958; *C. N. O. & Tex. Pac. R. R.* v. *Interstate C. C.* (1896) 162 U. S. 184, 16 Sup. Ct. 700.

[49] "The provisions of this act shall also apply to such transporation of passengers and property . . . but only in so far as such transportation . . . takes place within the United States, but shall not apply to the transportation of passengers or property . . . wholly within one state and not shipped to or from a foreign country from or to any place in the United States as aforesaid." Transportation Act of 1920, § 400 (2 and 2a), amending § 1 of the Act to Regulate Interstate Commerce (1887).

is obvious that if the intrastate rates were discriminatory, they could be raised by the order of the commission as a necessary regulation of interstate commerce.[50] Again, the court seems to think that the only ground for federal interference is the existence of discrimination. This seems to be an unreasonable interpretation of the phrase "to regulate commerce". This power is not limited to prohibiting and restraining; it includes the fostering and development of interstate commerce as well. Economic reasons for giving the national government complete power over the country's transportation system are becoming more and more potent. The desirability of unity in rate regulation is apparent. Although there are many decisions supporting the doctrine of separability of rate making,[51] such a doctrine is economically untenable. Allocation of overhead charges is an impossibility.[51a] Moreover, it is clear that railroads can not extend their lines and increase their equipment unless their total income from their combined business warrants such expenditures. If it is an economic fact that lower intrastate rates so decrease the total income from the railroad business as to retard the development of interstate commerce, Congress, under the commerce clause and the necessary-and-proper clause, should be able to increase them.

That Congress can do so is clearly set forth in *Lehigh Valley R. R.* v. *Public Service Commission of New York.*[52] In this case an action was brought by the plaintiff and other interstate railroads to restrain the state commission from enforcing its order refusing to allow the railroad companies to raise their intrastate rates to the same level as those fixed by the Interstate Commerce Commission. The federal District Court held that Congress had power to legislate so as to grant the federal Commission authority to fix intrastate rates in order that the railroads may earn an annual net railway operating income from their combined interstate and intrastate business as provided by the Transportation Act.[53] The decision seems sound, both from a constitutional and economic point of view.[54]

In the *Employers' Liability Cases,*[55] Congress was allowed to apply its statute to employees engaged in work on appliances not part of the interstate train itself, and which were used in both interstate and intrastate commerce, on the theory that this was a regulation of interstate commerce. This may be true, yet it is equally true that the thing on which the regulation impinges is intrastate commerce as well. If something affects interestate commerce adversely, Congress can remove

[50] Intrastate commerce was likewise excluded from the operation of the original Act to Regulate Interstate Commerce (1887), and yet Congress was able to raise intrastate rates to the level of interstate rates to prevent discriminaion. See *supra,* footnotes 32, 35.

[51] See *supra,* footnote 21.

[51a] On difficulty of allocation of charges, see *Grosbeck* v. *Duluth, etc. Ry. Co.* (1919) 250 U. S. 607, 614, 40 Sup Ct. 38.

[52] (D. C. N. D. N. Y. 1921) 64 N. Y. L. J. 1869.

[53] See *supra,* footnote 43.

[54] " . . . Uniformity of rates to make for the proper transportation facilities were essential to the success of the purpose sought to be effected by the terms of the Transportation Act. . . . It is because the rate fixed by the . . . Public Service Commission of New York casts a direct burden upon the interstate commerce and is jeopardizing the power of the national carriers to maintain themselves on the basis which Congress declared they should be maintained . . . that this court grants relief." See *supra,* footnote 51, p. 1870.

[55] *New York Central R. R.* v. *White* (1917) 243 U. S. 188, 37 Sup. Ct. 247. The first federal employer's liability act was held void because it included regulation of persons engaged wholly in intrastate commerce. *Employers' Liability Cases* (1908) 207 U. S. 463, 28 Sup. Ct. 141. In the *Second Employers' Liability Cases* (1912) 223 U. S. 1, 51, 32 Sup. Ct. 169, the court said, "It is a mistaken theory that treats the sources of the injury, rather than its effect upon interstate commerce, as the criterion of Congressional power." See (1919) 19 COLUMBIA LAW REV. 395.

the cause of that effect, even though the cause is not itself interstate commerce.[56] If the Supreme Court agrees with the economic data of the Interstate Commerce Commission, it will no doubt uphold the validity of the latter's order to increase intrastate rates to the level of interstate rates. The question of discrimination is not even relevant. The *Long Island R. R. and Staten Island Rapid Transit Co.* case[57] presents more difficulty, for here the volume of interstate business is negligible. The court might well make an exception of such a situation.[58] If the interstate business is so small, there probably exists no *imperative* economic reason for raising the intrastate rates. On the other hand if such an increase is desirable from an economic standpoint, the power of Congress through the federal Commission to order the increase seems clear. Judicial approval of increasing federal power, based on economic necessity, has practically deprived the states of their rate-making functions.

THE BREACH IN LIMINE DOCTRINE.—In contracts breaches may occur at the outset or after part performance. To the former the late Professor Langdell applies the term breach *in limine,*[1] and lays down the harsh rule that such a breach, however slight, bars recovery; or stated in other terms, a plaintiff must, as a condition precedent, show that he has not broken his promise at the very outset. The whole doctrine would not warrant a treatment were it not for the fact that it is so widely taught in law schools. The purpose of this note is to discuss the doctrine in its theoretical aspects and also to review the authorities upon which the doctrine is supposedly based.

Langdell cites many cases in which there was a breach *in limine*[2] but the court after inquiring into the materiality of the breach allowed a recovery. He laments the fact that the court entered into such an inquiry. For instance, in *Richie* v. *Atkinson,*[3] the plaintiff promised to ship a full cargo of goods from Sweden to England, but actually carried considerably less. The defendant was sued for his refusal to accept less than complete performance and judgment was rendered against him, because the plaintiff substantially performed his promise and the defendant had his remedy by counterclaim. This was a true breach *in limine.* Langdell says that the decision can be sustained only by inferring from the construction of the contract that full performance was not a condi-

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[56] In *United States* v. *Ferger* (1919) 250 U. S. 199, 39 Sup. Ct. 445, the court held that Congress had the power to punish the use of a fictitious interstate bill of lading, even though such a bill related to no actual or contemplated commerce. The court said that it is untrue "that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt" with instead of by the relation of that subject to commerce and its effect upon it. The power of Congress must include authority to deal "with a host of other acts, which, because of their relation to and influence upon interstate commerce, comes within the power of Congress to regulate, although they are not interstate commerce in and of themselves."

[57] See, *supra,* footnote 47.

[58] In *Fort Smith & W. R. R.* v. *Mills* (1920) 253 U. S. 206, 40 Sup. Ct. 526, the Supreme Court held that the Adamson Law, U. S. Comp. Stat. (1916) §§ 8680a-8680d, did not forbid the doing of work by railroad employees at a lower price than that set forth in the act, in the case of an insolvent road which was unable to pay its way. Here, the employees, appreciating the situation, were desirous of keeping on at the old rates fixed by agreement. This case shows that the Supreme Court will make exceptions to the general rule where economic necessity requires it.

[1] Langdell, *Contracts* (1880) 209-219.

[2] Langdell., *op. cit.* 215; *Clipsham* v. *Vertue* (1869) 5 Q. B. 265; *Tarrabochia* v. *Hickie* (1856) 1 H. & N. 183; *MacAndrew* v. *Chapple* (1866) L. R. 1 C. P. 643.

[3] (1808) 10 East 295.